No. 87-1684

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MUTUAL LIFE INSURANCE COMPANY OF NEW YORK,
Petitioner,

v.

ESTATE OF RAY LAMAR WESSON, M.D., DECEASED, BY EMOGENE HALL, ADMINISTRATRIX AND AS GUARDIAN OF RAY LAMAR WESSON, JR., ALLISON LYNN WESSON, DAVE NEWTON WESSON AND JASON MANNING WESSON, MINORS,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Mississippi

BRIEF AMICUS CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

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QUESTIONS PRESENTED

1. Whether this Court's decision in *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987)—holding that the Employee Retirement Income Security Act of 1974 ("ERISA") preempts state common law actions based upon alleged improper processing of claims for benefits under an ERISA-regulated employee benefit plan—should be applied to factual situations arising before the decision was announced.

2. Whether the decision of the Supreme Court of Mississippi upholding a $1.5 million punitive damage award against Mutual Life Insurance Company of New York ("MONY") on an insurance claim of $87,136 violates the Due Process Clause.

3. Whether the decision of the Supreme Court of Mississippi upholding massive punitive damages imposes an excessive fine in violation of the Eighth Amendment.

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BRIEF AMICUS CURIAE FOR AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

This brief is filed on behalf of the American Council of Life Insurance ("Council"), as amicus curiae, in support of the petition for certiorari.

INTEREST OF THE AMICUS[1]

The Council is the largest life insurance trade association in the United States, representing the interests of

[1] Consent from counsel for both parties has been filed with the Clerk of this Court.

635 member life insurance companies. The impact of the decision below on the many members of the Council who issue insurance policies to and administer employee benefit plans governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001 *et seq.*, is substantial. The Supreme Court of Mississippi declined to apply this Court's unanimous holding in *Pilot Life Insurance Co. v. Dedeaux*, 107 S. Ct. 1549 (1987) ("*Pilot Life*"), that ERISA's civil enforcement provisions preempt common law actions against an insurer for alleged improper processing of a benefit claim under an ERISA-regulated plan, even though it was advised of *Pilot Life* before rendering the decision below. By subjecting members who insure and administer ERISA plans to the uncertainty that lower courts will apply *Pilot Life* only to facts arising after that decision was rendered, the decision below enlarges the risk of insurers to the varying, and often inconsistent, standards of conduct imposed by state common law rules.

The opinion below is important to members of the Council for yet another reason: it creates the possibility that the nonpayment of an insurance claim under an ERISA plan may be accompanied by an unpredictable and very substantial punitive award. It allows claimants under ERISA plans to circumvent ERISA's carefully-crafted enforcement scheme, merely because ERISA preemption issues were not raised in the trial court, and obtain awards of punitive damages under state common law in such cases. Faced with large and unpredictable punitive awards, members of the Council may be unable to provide affordable insurance policies to employers who voluntarily establish ERISA plans. The Council thus has a direct and immediate interest in the issues presented here.

STATEMENT [2]

On February 1, 1974, Petitioner Mutual Life Insurance Company of New York ("MONY") issued a whole-life insurance policy to the Surgical Clinic of Biloxi, P.A. Pension Plan ("Plan") on the life of Dr. Ray Lamar Wesson. The Plan is an employee benefit plan governed by ERISA.[3]

On March 14, 1980, Dr. Wesson died. Shortly thereafter, Dr. Wesson's children, the beneficiaries of the policy, filed a claim with MONY. On June 2, 1980, MONY advised the beneficiaries that the policy, which had a face value of $87,136, had lapsed to a reduced paid-up value of $3,687 because two premiums were unpaid and the policy had no Automatic Premium Loan ("APL") provision. In denying the claim, MONY relied on its computer records which erroneously indicated that the policy had no APL provision.

The Proceedings Below

Respondent, Estate of Ray Lamar Wesson, M.D., *et al.* ("the Wesson Estate"), instituted this suit in Jackson County Circuit Court on August 30, 1982. It sought $87,136 in compensatory damages and unspecified punitive damages for MONY's alleged bad faith refusal to pay the policy claim. Shortly after the Wesson Estate filed suit, MONY discovered the operative effect of the APL provision. It promptly admitted liability and offered to pay $87,136, plus interest, to the policy's beneficiaries. The beneficiaries declined MONY's offer.

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[2] This brief omits references to the reports of the opinions below, a statement of the grounds of jurisdiction, and a recitation of the statutes and constitutional provisions involved, in view of the statements in Petitioner's brief on these subjects.

[3] Although adopted prior to the enactment of ERISA, the Plan was amended in 1976 to ensure compliance with ERISA.

At trial, the only questions before the jury were whether and in what amount punitive damages should be awarded.[4] The jury awarded the Wesson Estate $87,136 in compensatory damages and $8 million in punitive damages. The jury did so after hearing evidence that, in 1982, MONY had total assets of $8.7 billion and a net worth of $447.9 million. *See* 517 So. 2d at 539. On appeal, the Mississippi Supreme Court affirmed the judgment on the condition—which the Wesson Estate accepted—of a remittitur of the punitive damages award in the amount of $6.5 million.

As to the issue of liability for punitive damages, the court below acknowledged Mississippi precedents that an insurer's demonstration of an "arguable reason" for denying coverage generally precludes submission of a punitive damages claim to the jury. *See, e.g., Weems v. American Security Insurance Co.*, 486 So. 2d 1222 (Miss. 1986); *Standard Life Insurance Co. v. Veal*, 354 So. 2d 239 (Miss. 1977). The court below then applied its substantive test for awarding punitive damages in bad faith cases, which requires proof "by a preponderance of evidence either (1) that the insurer acted with malice, or (2) that the insurer acted with gross negligence or reckless disregard for the rights of others." 517 So. 2d at 528 (quoting *Aetna Casualty & Surety Company v. Day*, 487 So. 2d 830, 832 (Miss. 1986)). Despite MONY's contention that its unilateral error constituted only simple negligence and provided an "arguable reason" for denying the Wesson Estate's claim, the court below nevertheless sustained the trial court's decision to submit the punitive damages claim to the jury. It found that "it cannot be contended seriously that MONY had an *arguable reason or a legitimate reason or a justifiable reason* (all three amount to the same) for denying the Wesson death claim." *Id.* (emphasis added).

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[4] MONY had admitted liability and deposited the full policy amount with the registry of the court.

As to the amount of the punitive damages award, four justices concluded, after applying so-called "established standards," that the award was excessive and should be remitted pursuant to Miss. Code Ann. § 11-1-55 (Supp. 1987). 517 So. 2d at 533. Applying the same standards, three justices dissented. They concluded that "[t]his [$8 million] award, although high, is not disproportionate to the transgression involved in this case and the financial ability of the appellant to pay." *Id.* at 540. Despite their acknowledgement that "the jury does not have as clear a guideline by which to determine the amount necessary to adequately punish the wrongdoer, protect the public and deter such future conduct," the dissenting justices declined to engage in "the business of regulating punitive damages." *Id.* at 540-41. They noted that, under the majority's standard, "a defendant, however obstinate and reprehensible his conduct, can victimize others and engage in such conduct with full assurance under this case that his monetary punishment will be much less than 1% of his net worth." *Id.* at 539.[5]

Justice Robertson, in a separate opinion, dissented on the ground that this Court's decision in *Pilot Life* deprived the court of authority to decide the case.

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[5] The $8 million punitive award assessed by the jury represented approximately 1.785% of MONY's net worth in 1982. The court-substituted award of $1.5 million represents approximately .335% of MONY's net worth. *See* 517 So.2d at 539.

REASONS FOR GRANTING THE WRIT

I. THE QUESTION OF THE PROPER APPLICATION OF *PILOT LIFE INSURANCE CO. V. DEDEAUX* PRESENTS AN IMPORTANT ISSUE OF FEDERAL LAW WARRANTING THIS COURT'S REVIEW

In *Pilot Life*, this Court unanimously held that ERISA's exclusive civil enforcement remedies preempt state common law actions based upon the alleged improper processing of a claim for benefits under an insured ERISA plan. Although the instant case presents precisely such a claim, the court below failed to address ERISA's preemption of the Wesson Estate's claim, noting only that the issue was "not raised in the lower court or in the appellate briefs and argument" and that *Pilot Life* was decided after the appeal in this case was "submitted." 517 So. 2d at 529 n.3. Because the decision below raises important issues as to the appropriate application of *Pilot Life*, this Court should grant review.

This Court's decisions generally apply to pending cases. *See Robinson v. Neil*, 409 U.S. 505, 507-08 (1973).[6] The Constitution, however, neither prohibits nor requires the application of new rules retrospectively. *Tehan v. United States*, 382 U.S. 406 (1966); *Linkletter v. Walker*, 381 U.S. 618 (1965). Thus, in deciding the issue of retroactivity, this Court considers "first, whether the holding in question 'decid[ed] an issue of first impression whose resolution was not clearly foreshadowed' by earlier cases

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[6] The issue of the application of decisions to existing facts generally arises in one of four contexts, i.e., application of the decision to: (1) the case in which the rule is announced; (2) cases which are "final," i.e., no longer subject to direct review; (3) cases tried or retried in the future; and (4) cases pending on direct review when the rule is announced. *See* Chamberlin, *United States Supreme Court's Views As To Retroactive Effect Of Its Own Decisions Announcing New Rules*, 65 L.Ed.2d 1219 annot. (1981). This case falls in the last category.

. . .; second, 'whether retrospective operation will further or retard [the] operation' of the holding in question . . .; and third, whether retroactive application 'could produce substantial inequitable results' in individual cases. . . ." *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88 (1982), quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971). These considerations point to *Pilot Life*'s application here.[7]

That *Pilot Life*'s reaffirmation of the preemptive breadth of ERISA was "foreshadowed" is plain. Indeed, prior to *Pilot Life*, this Court had consistently recognized that ERISA's "deliberately expansive" (*Pilot Life*, 107 S. Ct. at 1552) preemption provisions were intended to make employee benefit plan regulation a matter of virtually exclusive federal concern. *See Metropolitan Life Insurance Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504 (1981). Moreover, before *Pilot Life*, several lower federal courts had concluded that ERISA preempts state common law claims, like those asserted here, at least insofar as they related to self-funded ERISA plans.[8] Simply

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[7] At least one court has expressly addressed the retroactivity issue presented here, but declined to apply *Pilot Life* in the absence of a ruling by this Court to the contrary. *Ewalt v. Mereen-Johnson Mach. Co.*, 414 N.W.2d 28 (S.D. 1987).

[8] *See Powell v. Chesapeake & Potomac Telephone Co.*, 780 F.2d 419 (4th Cir. 1985), *cert. denied*, 476 U.S. 1170 (1986) (ERISA preempts state common law action for alleged mishandling of a benefit claim filed against employer and insurer-administrator of self-funded plan); *Russell v. Massachusetts Mutual life Insurance Co.*, 722 F.2d 482 (9th Cir. 1983) (holding that ERISA preempts state contract and tort law actions arising from an alleged mishandling of a benefit claim), *rev'd on other grounds*, 473 U.S. 134 (1985); *see also Light v. Blue Cross and Blue Shield of Alabama, Inc.*, 616 F. Supp. 558 (S.D. Miss. 1985), *aff'd in relevant part*, 790 F.2d 1247 (5th Cir. 1986); *Justice v. Bankers Trust Co.*, 607 F. Supp. 527 (N.D. Ala. 1985).

put, *Pilot Life* "did not overrule any prior decisions of this Court or invalidate a practice of heretofore unquestioned legitimacy"; rather, it addressed an important, but unresolved, question of statutory interpretation. *Brown v. Louisiana*, 447 U.S. 323, 335 (1980); *see also Desist v. United States*, 394 U.S. 244, 250-51 (1969); *Stoval v. Denno*, 388 U.S. 293, 300 (1967).

Pilot Life's application to this case, moreover, will further its operation. In enacting ERISA, Congress:

> clearly expressed an intent that the civil enforcement provisions of ERISA § 502(a) be the exclusive vehicle for actions by ERISA-plan participants and beneficiaries asserting improper processing of a claim for benefits, and that varying state causes of action for claims within the scope of § 502(a) would pose an obstacle to the purposes and objectives of Congress.

Pilot Life, 107 S. Ct. at 1555. Giving effect to that intent in *Pilot Life*, the Court concluded that ERISA preempted state law claims like those raised in this case. By failing to apply *Pilot Life* here, the decision below frustrates Congress' intent to create, and this Court's enforcement of, a uniform federal scheme of employee benefit plan regulation.

Finally, *Pilot Life*'s retroactive application would hardly produce "substantial inequitable results." *Cipriano v. City of Houma*, 395 U.S. 701, 706 (1969) (per curiam).[9] In enacting ERISA's "virtually unique preemption provision," *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24 n.26 (1983), Congress:

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[9] *See also Chevron Oil Co. v. Huson*, 404 U.S. at 108 n.10 (holding that this Court's decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), did not apply retroactively with regard to state statutes of limitations, but was retroactive with regard to state substantive remedies because "[r]etroactive application . . . would not work a comparable hardship or be so inconsistent with the purpose of the [act]").

> careful[ly] balanc[ed] . . . the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefit plans. The policy choices reflected in the inclusion of certain remedies and the exclusion of others under the federal scheme would be completely undermined if ERISA-plan participants and beneficiaries were free to obtain remedies under state law that Congress rejected in ERISA.

Pilot Life, 107 S. Ct. at 1556. The decision below drastically upsets this balance. In denying effect to *Pilot Life* with respect to outstanding cases, it permits claimants with pending appeals to circumvent ERISA and reap the benefit of unwarranted windfalls—in the form of substantial punitive damages—despite the contrary intent of Congress.

To apply *Pilot Life* prospectively only would greatly enlarge the risks of insurers who insure and administer ERISA plans to the varying, and often inconsistent, standards of conduct imposed by state common law rules in cases on appeal. Such a result would only disrupt the uniformity that ERISA was intended to promote. This Court should grant the Petition and resolve this important issue.

II. THIS COURT SHOULD GRANT REVIEW TO ADDRESS THE CONSTITUTIONAL INFIRMITIES IN PUNITIVE DAMAGES LAW

This case also presents an important, and frequently recurring, issue of federal constitutional law: whether the open-ended assessment of punitive damages by juries and the courts is so standardless and unfair as to violate due process.[10] The burgeoning development of modern puni-

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[10] The issues whether punitive damages violate due process and the Excessive Fines Clause of the Eighth Amendment have been briefed and argued to this Court in *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d 254 (Miss. 1985), *appeal docketed*, 54 U.S.L.W. 3743 (U.S. Apr. 25, 1986), *argued*, 56 U.S.L.W. 3398 (U.S. Nov. 30, 1987) (No. 85-1765).

tive damages law—exemplified by the decision below affirming an $8 million award on condition of remittitur to $1.5 million for failure to pay an $87,136 insurance claim—is at odds with the doctrines of standards and fairness embodied in the Due Process Clause.

Punitive damages are not "a favorite of the law." *Smith v. Wade*, 461 U.S. 30, 58 (1983) (Rehnquist, J., dissenting) (citations omitted). Current practices regarding punitive damages are neither time honored nor logically related to traditional legal doctrines. *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140-46 (1986). Through decisions such as the one below, punitive damages have been extended far beyond their origin as a means to compensate, in relatively small amounts, victims of insult torts and similar intangible injuries. *See* Nelson, *Punishment for Profit: An Examination of the Punitive Damages Award in Strict Liability*, 18 Forum 377, 380-81 (1983); *Day v. Woodworth*, 13 Howard 363, 371 (1851).[11] Despite a steady growth in the type of injuries, intangible or otherwise, for which courts now provide compensation, punitive damages law has expanded uncontrollably and arbitrarily.[12] Juries, left unguided, have awarded punitive damages against insurance companies

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[11] As has been well said in another context, "these laws are being extrapolated to places where they no longer apply." Bernstein, "Dread Singularities" (Book Review), New York Times Book Review, April 25, 1982, p. 10.

[12] The best known example is the $1 billion punitive damages award recently upheld against Texaco. *See Texaco, Inc. v. Pennzoil Co.*, 729 S.W.2d 768, 866 (Tex. Ct. App. 1987). Results in product liability and mass tort cases illustrate these trends as well. *See, e.g., Tetuan v. A.H. Robins Co.*, 241 Kan. 441, 738 P.2d 1210 (1987) ($7.5 million); *Ford Motor Co. v. Durrill*, 714 S.W.2d 329 (Tex. Ct. App. 1986) ($10 million); *Grimshaw v. Ford Motor Co.*, 119 Cal. App.3d 757, 174 Cal. Rptr. 348 (1981) ($125 million punitive award remitted to $3.5 million); *Ford Motor Co. v. Stubblefield*, 171 Ga. App. 331, 319 S.E.2d 470 (1984) ($8 million); *Palmer v. A.H. Robins Co.*, 684 P.2d 187 (Colo. 1984) ($6.2 million).

"in a way that could only be called freakish." *Gregg v. Georgia*, 428 U.S. 153, 206 (1976).[13] The decision below —with four justices applying "established standards" to arrive at a $1.5 million award and three justices applying the same standards to affirm an $8 million award— provides an appropriate opportunity for this Court to address this haphazard and standardless area of law.[14]

A. The Punitive Damages Award In The Decision Below Is Penal And, As Such, Requires Application Of Procedural Safeguards Available In Criminal Trials

The decision below diverges from the established principle that "punishment cannot be imposed 'without due process of law.'" *Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 186 (1963). The purposes and impact of punitive damages are plainly penal, and, accordingly, constitutional protections akin to those accorded to criminal defendants should be afforded to defendants in punitive damages actions. Because the courts below failed to accord such protections here, this Court should grant review.

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[13] *See, e.g., Hawkins v. Allstate Insurance Co.*, 152 Ariz. 490, 733 P.2d 1073, *cert. denied*, 108 S. Ct. 212 (1987) ($3.5 million punitive award affirmed); *Downey Savings & Loan Ass'n v. Ohio Casualty Insurance Co.*, 189 Cal. App. 3d 1072, 234 Cal. Rptr. 835 (1987) ($5 million punitive award); *T.D.S. Inc. v. Shelby Mutual Insurance Co.*, 760 F.2d 1520 (11th Cir.) ($2.1 million award affirmed), *modified in part*, 769 F.2d 1485 (1985).

[14] That this issue is genuinely ripe for review is exemplified by the fact that the Justice Department, a task force of the American College of Trial Lawyers, and the American Bar Association independently have recommended needed reforms in this troublesome area of the law. *See* Report of the Tort Policy Working Group on the Causes, Extent and Policy Implications of the Current Crisis in Insurance Availability and Affordability (February 1986) at 2 (attributing insurance crisis in part to "the explosive growth in the damages awarded in tort lawsuits, particularly with regard to non-economic awards such as . . . punitive damages"); Report of the Task Force on Litigation Issues of the American College of Trial Lawyers (August 8, 1986); Resolutions of the American Bar Association, approved February 1987.

Though nominally civil, punitive damages are functionally penal. *Cf. United States v. Ward*, 448 U.S. 242, 248-49 (1980) (where penalty is "so punitive either in purpose or effect" as to negate its civil label, it will be treated as penal). Indeed, this Court has so recognized:

> Punitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to *punish* reprehensible conduct and to *deter* its future occurrence.'

International Brotherhood of Electrical Workers v. Foust, 442 U.S. 42, 48 (1979) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (emphasis added)). *See also Smith v. Wade*, 461 U.S. at 58 (Rehnquist, J., dissenting); *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266-67 (1981). Punitive damages, as awarded below, promote only the traditional goals of punishment, e.g., retribution and deterrence, which this Court has stated "are not legitimate nonpunitive government objectives." *Bell v. Wolfish*, 441 U.S. 520, 539 n.20 (1979).[15]

That the award of $8 million on condition of remittitur to $1.5 million on the Wesson Estate's $87,136 in-

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[15] Assessed under the list of considerations stated in *Kennedy v. Mendoza-Martinez*, 372 U.S. at 168-69, punitive damages can only be deemed penal. While punitive damages impose no "affirmative disability or restraint," *id.* at 168, they may be imposed upon a showing of "willfulness" or "maliciousness," they are often assessed in amounts greater than criminal sanctions involving similar conduct, and no alternative purposes—other than punishment and deterrence—can rationally be assigned to them. *See* Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987), Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139 (1986), Grass, *The Penal Dimensions of Punitive Damages*, 12 Hastings Const. L. Q. 241 (1985), and Wheeler, *The Constitutional Case for Reforming Punitive Damages*, 69 Va. L. Rev. 269 (1982), for careful analyses of the penal nature of punitive damages.

surance claim was "penal" in a constitutional sense, so as to require enhanced procedural safeguards, is plain. As the court below stated, such an award "is necessary for *punishment of the wrongdoing*" and to "make an example of the defendant so that others may be *deterred* from the commission of similar offenses." 517 So. 2d at 532 (quoting *Bankers Life & Casualty Co. v. Crenshaw*, 483 So. 2d at 278) (emphasis added). Despite its penal character, the punitive award rendered against MONY was accompanied by none of the procedural safeguards mandated by due process. The courts below penalized—and stigmatized—MONY without the protection of a constitutionally-mandated, elevated standard of proof, and without the benefits of more stringent pleading requirements in criminal cases. *See Mullaney v. Wilbur*, 421 U.S. 684 (1975); *In re Winship*, 397 U.S. 358 (1970); *Cole v. Arkansas*, 333 U.S. 196 (1948); *cf. Santosky v. Kramer*, 455 U.S. 745 (1982) (enhanced burden of proof is required by Constitution where proceedings threaten one of the parties with a significant stigma). In addition, unlike criminal defendants who face maximum punishments, MONY's "punishment" was left to the unbridled and unlimited discretion of a jury, with standardless review by the court below. By permitting such punishment to be assessed—without heightened procedural safeguards accorded to criminal defendants—the court below denied MONY constitutionally-required due process.[16]

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[16] A further Due Process Clause concern is raised through the decision below by the fact that punitive damages are taken from MONY and paid not to the government but to a private plaintiff, the Wesson Estate, above and beyond its actual damages. MONY is mulcted by governmental actions in order to give the Wesson Estate a windfall. This is a clear case of an exercise of governmental power "that takes *property* from A. and gives it to B"—which one of the earliest opinions to issue from this Court cited as a paradigm of action beyond legislative power. *Calder v. Bull*, 3 Dallas 386, 388 (1798) (Chase, J.; emphasis in original).

B. The Standards Applied In The Decision Below To Determine Liability For Punitive Damages Are Constitutionally Deficient

That punitive damages actions, as they now exist, fail to comport with even the simplest notion of due process is further evident from the complete lack of intelligible standards for imposing liability for punitive damages—a deficiency starkly illustrated by the decision below. Indeed, although the court below cited one standard—that punitive damages are recoverable only upon proof "by a preponderance of evidence either (1) that the insurer acted with malice, or (2) that the insurer acted with gross negligence or reckless disregard for the rights of others," 517 So. 2d at 528 (quoting *Aetna Casualty & Surety Co. v. Day*, 487 So. 2d at 832)—it also referred to a different test, i.e., whether MONY failed to offer "an 'arguable reason' for denying a claim", *id.* at 527. Because both "standards" are constitutionally deficient, this Court should grant review.

Under the Fifth and Fourteenth Amendments, punishment without culpability is clearly a denial of due process. *See Smith v. Wade*, 461 U.S. at 87-88 (Rehnquist J., dissenting) ("It is anomalous, and counter to deep-rooted legal principles and common-sense notions, to punish persons who meant no harm. . ."). But punitive damages—often awarded with no showing of intentional culpability—do precisely that. Indeed, the "standards" for imposing these damages, though never carefully defined, have been perceptibly lowered, permitting courts to award punitive damages against a defendant whose conduct can be characterized, at most, by some heightened degree of negligence. *See* Meyers & Barrus, *Punitive Damages in Product Liability Cases: A Survey*, 52 Ins. Couns. J. 212 (1984); Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 34-37 (1982). Moreover, the blurred distinctions between "gross negligence" and "reckless negligence" give judges and juries no real guidance in awarding punitive dam-

ages.[17] As a result, they remain free to "assess punitive damages in wholly unpredictable amounts bearing no necessary relation to the actual harm caused . . . [and] to use their discretion selectively to punish expressions of unpopular views. . . ." *International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 51 n. 14, quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350.

These difficulties are all too evident in the present case. The court below upheld the jury's punitive award, as remitted to $1.5 million, after finding that MONY had shown no "proper reason" for declining to pay the Wesson Estate's claim and that MONY's contention that it was guilty of "only simple negligence" was "overwhelmingly rebutted." 517 So. 2d at 528. But MONY did offer to pay the full face amount of the policy immediately after it discovered its error.[18] It is not clear what else MONY could have done, or should do in the future, to avoid such punishment, except to pay all claims made promptly and without question.

C. Leaving The Computation Of Punitive Damages To The Standardless Discretion Of The Jury And The Court Fails To Satisfy Due Process And Raises Equal Protection Concerns

The "standards" used for determining the amount of punitive damages to be assessed against MONY are equally deficient and warrant this Court's review. In

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[17] *See* Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 Stan. L. Rev. 281, 297 (1978) ("the distinction between recklesness and negligence relates to no clear behavioral standards in the real world").

[18] In addition, as a precautionary measure, MONY modified its claims evaluation procedure after this suit was filed to require death claims personnel to review both the policy application and the computer printout before denying a claim. *See* 517 So.2d at 527.

contrast to criminal sanctions, punitive damages are generally computed without regard to any statutory or common law maximum, and no rational, intelligible, or workable measure of damages exists. The amounts of punitive damages are left to the unbounded discretion of the jury and the court, guided only by ill-defined factors, including the wealth of the defendant, and "the gentle rule that they not be excessive." *Gertz v. Robert Welch, Inc.*, 418 U.S. at 350. *See also International Brotherhood of Electrical Workers v. Foust*, 442 U.S. at 50-51; *Smith v. Wade*, 461 U.S. at 56-65, 92-94 (dissenting opinions of Rehnquist and O'Connor, JJ.)

The present case provides a stark example of unbridled jury discretion and confused judicial scrutiny. In penalizing MONY, the jury below was guided by no more definite standards than that its award should serve as punishment and a deterrent and should take into account MONY's wealth. Swayed by evidence that MONY's assets and net worth totaled $8.7 billion and $447.9 million respectively, the jury apparently plucked its $8 million punitive award out of the air. That award bears little, if any, relationship to customary criminal sanctions or to meaningful punishment.

Imposing a massive punitive damages award on the basis of wealth, moreover, raises equal protection concerns. The Fourteenth Amendment's requirement of equality governs all branches of government, *Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948), and ensures that states treat equally, and not capriciously, each member of society. *See Metropolitan Life Insurance Co. v. Ward*, 470 U.S. 869 (1985). That requirement is plainly inconsistent with the notion that a jury may, without other limit or standard, penalize a defendant based on its wealth. *Harper v. Virginia Board of Elections*, 383 U.S. 663, 668 (1966) (wealth as a means of classification is "traditionally disfavored").

An award of punitive damages based on a differential of wealth bears no rational relationship to the plaintiff's injury or to the defendant's culpability. A higher punitive sanction determined by considering wealth—a standard distinct from the concept of fault—threatens a discriminatory and unjustifiable stigma of iniquity to a wealthier defendant, while benefiting a less wealthy, but equally or more culpable, defendant. Upholding an award that subjects a defendant to different treatment based on wealth also gives a jury unfettered discretion to apply the law invidiously, thereby disintegrating the ideal of equality embodied in the Fourteenth Amendment.

Moreover, an award of punitive damages based on wealth is completely capricious. If there are faults in this case, they were committed by MONY's employees. MONY has no stockholders—it is a mutual company. The burden of any damages which MONY must pay will be borne by its policyholders, either through decreased dividends on their insurance or through increased premiums for future policies. But these policyholders bear no responsibility for the fault. To single them out to bear the burden of a vast punitive damages judgment, simply because MONY is a big company, can hardly be regarded as providing equal protection of the law.

Finally, the standards upon which the court below relied in scrutinizing the jury's punitive award are likewise constitutionally deficient. Faced with the same evidence, four justices invoked the court's remittitur authority to reduce by fivefold the punitive award which they deemed "excessive after applying the established standards", 517 So. 2d at 533; three justices dissented, concluding that "[t]his Court is not authorized to disturb a jury verdict regarding the amount of damages because it 'seems too high, or seems too low.'" *Id.* at 540 (quoting *Toyota Motor Co. v. Sanford*, 375 So. 2d 1036, 1037 (Miss. 1979)). The decision below thus amply exemplifies the

typically random, unpredictable and unprincipled process by which courts review jury awards of punitive damages.[19]

III. THE DECISION BELOW UPHOLDING MASSIVE PUNITIVE DAMAGES VIOLATES THE EIGHTH AMENDMENT

The Eighth Amendment ensures that punishment will not be meted out arbitrarily or in excessive amounts wholly disproportionate to the offense. In *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-29 (1986), this Court stated that whether the imposition of massive punitive damages "is impermissible under the Excessive Fines Clause of the Eighth Amendment . . . raise[s] important issues which, in an appropriate setting, must be resolved." This case presents such an appropriate setting.

Although this Court has had few occasions to address the Excessive Fines Clause of the Eighth Amendment, it has long recognized the "constitutional principle of proportionality" embodied in the Cruel and Unusual

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[19] Courts have affirmed many awards in their entirety. *See, e.g., Hawkins v. Allstate Insurance Co., supra* (affirming a $3.5 million punitive award). Applying varying standards, other courts have either reversed punitive awards or reduced them. *See, e.g., San Jose Production Credit Ass'n v. Old Republic Life Insurance Co.*, 723 F.2d 700 (9th Cir. 1984) (reversing $500,000 punitive award); *Egan v. Mutual of Omaha Insurance Co.*, 24 Cal.3d 809, 169 Cal. Rptr. 691 (1979), *appeal dismissed*, 445 U.S. 912 (1980) ($5 million punitive award held excessive); *Underwriters Life Insurance Co. v. Cobb*, No. 13-86-456-CV (Tex. Ct. App. 1988) (LEXIS, States library, Tex. file) (affirming $1 million punitive award against insurer for refusal to pay $6,250 claim on condition of a remittitur of $500,000); *Demsey v. Auto Owners Insurance Co.*, 717 F.2d 556 (11th Cir. 1983) (court held jury award of $3.1 million to be excessive and remanded with directions to require a remittitur to $1.5 million without explaining any basis for the $1.5 million figure it selected).

Punishments Clause. *Solem v. Helm*, 463 U.S. 277, 286 (1983); *see Weems v. United States*, 217 U.S. 349, 367 (1910) ("it is a precept of justice that punishment for crime should be graduated and proportioned to offense").[20] Given the common origin of the clauses of the Eighth Amendment, the concept of proportionality should be equally applicable to the Excessive Fines Clause. *See generally* Kenefick, *The Constitutionality of Punitive Damages Under the Excessive Fines Clause of the Eighth Amendment*, 85 Mich. L. Rev. 1699 (1987); Bittle, *Punitive Damages and the Eighth Amendment: An Analytical Framework for Determining Excessiveness*, 74 Cal. L. Rev. 1433 (1987). Indeed, as this Court has stated:

> We have recognized that the Eighth Amendment imposes 'parallel limitations' on bail, fines and other punishments, *Ingraham v. Wright*, [430 U.S.] at 664, and the text is explicit that bail and fines may not be excessive. It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception.

Solem v. Helm, 463 U.S. at 289.[21]

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[20] The Eighth Amendment's ban against excessive punishments and its requirement of proportionality derive from the Magna Carta and "the longstanding principle of English law that the punishment . . . should not be . . . greatly *disproportionate* to the offense charged." R. Perry, *Sources of Our Liberties* 236 (1959) (emphasis added).

[21] That punitive damages are imposed in cases called civil should not bar the application of the Eighth Amendment to them. Not only are punitive damages functionally penal (as their name clearly indicates), but the Eighth Amendment, unlike some other Bill of Rights guarantees, does not distinguish between civil and criminal punishment. *See generally* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 147-51 (1986).

The governing principle of proportionality as a protection against arbitrariness and excessiveness in punishment cannot be squared with the award of $1.5 million in punitive damages against MONY for the "offense" of erroneously failing to pay a $87,136 insurance claim. This $1.5 million award—an amount 17 times the Wesson Estate's actual damages—can only be deemed arbitrary and wholly disproportionate to the offense charged.[22] Such misguided punishment should not be upheld under the plain words and purposes of the Eighth Amendment.

CONCLUSION

For the reasons set forth above, and for the additional reasons advanced in the Petition, the writ of certiorari should be granted.

Respectfully submitted,

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[22] Consideration of the fines allowed for violation of the Mississippi Insurance Code, which proscribes unfair or deceptive acts or practices in insurance, removes all doubt that the award here was excessive. Section 83-5-49 of the Mississsippi Code provides that a *willful* violation of a cease and desist order proscribing an unfair practice is punishable, at most, by a $1,000 fine. Miss. Code Ann. § 83-5-49.